No. 97-775

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION

ABBOTT LABORATORIES, *et al.*,

Petitioners,

—v.—

ROBERT A. HUGGINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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ARGUMENT[1]

A. THE VALIDITY OF COLLATERAL ESTOPPEL-BASED ARTFUL PLEADING MERITS THIS COURT'S REVIEW

1. Review Of This Case Will Enable The Court To Resolve Aspects Of The Artful Pleading Doctrine That Will Not Be Resolved By *Rivet*

Respondent contends that certiorari should be denied because the conflict among the circuits over the scope of the artful pleading doctrine has not focused on the precise question of whether collateral estoppel can form the foundation for removal based on artful pleading. Respondent misses the point. This Court granted certiorari in *Rivet v. Regions Bank of Louisiana, F.S.B.*, 108 F.3d 576 (5th Cir.), *cert. granted* __ U.S. __, 118 S. Ct. 31 (1997) to clarify the scope of the artful pleading doctrine. For the same reason, this Court should also review this complementary case. While disposition of *Rivet* is clearly relevant to a proper analysis of this case, it will not necessarily resolve the issues that are at the core of this case, as even the Respondent acknowledges. Respondent's Brief ("Resp. Br.") at 5. Having granted certiorari in *Rivet* to clarify the scope of the artful pleading doctrine, this Court should take the opportunity to address the related and important issue of federal law squarely presented here—whether federal courts are empowered to protect their jurisdiction by allowing removal of a follow-on action filed in state court where, as here, a central issue raised in the complaint was preclusively decided against the plaintiff in a virtually identical prior federal action.[2]

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[1] A complete Rule 29.6 Statement is included in the Petition for a Writ of Certiorari, dated November 3, 1997.

[2] Respondent points to the Petitioners' failure to raise federal question jurisdiction when removing *Price v. American Home Products, et al.*, 94 C 897 (N.D. Ill.) as making the questions presented here unworthy of this

This issue can confront parties in a multitude of circumstances. In many areas of law, our federal system affords plaintiffs the option of seeking redress under federal law or state law (or both) against the exact same conduct. That this is so in the antitrust area is evidenced by the fact that more than 150 federal law cases and more than 15 state law cases have been filed in various courts around the country over the past four-and-a-half years containing essentially the same allegations presented in the *Huggins* complaint. More than 150 of these cases have been transferred, along with *Price* and *Huggins*, to the district court of the Northern District of Illinois for consolidated pre-trial treatment. Litigation in the securities, employment discrimination and products liability fields are similarly characterized by concurrent federal and state actions.

In all of these areas, class (or shareholder) actions are common, giving plaintiffs the opportunity to refile in a state court whenever a federal court denies class certification. In the absence of removal jurisdiction to prevent a plaintiff from so circumventing a binding prior federal court ruling, defendants can be forced to return to state court to relitigate issues already decided in their favor, or argue the preclusive effect of the federal court's ruling. Such manipulation of our federal system by plaintiffs should not be tolerated. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981), teaches that it is not.

2. Respondent Mischaracterizes Aspects Of Petitioners' Arguments

Respondent complains of the "anomalous and unsound results" of collateral estoppel-based artful pleading. Resp. Br. at 11. But none of Respondent's charges can withstand

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Court's review. Resp. Br. at 3. Respondent neglects to add, however, that there was no prior federal court ruling to avoid when *Price* was removed. Instead, it was the ruling in *Price* itself that the Respondent sought to avoid by filing the *Huggins* action.

scrutiny. First, Respondent complains that allowing removal where, as here, Respondent's state court complaint constitutes an attempt to evade a preclusive federal court ruling would mean that the presence or absence of federal jurisdiction would depend on the timing of a plaintiff's suit in state court (before or after the preclusive adverse ruling) and on the outcome in federal court. This contention, however, is in no way unique to removal based on a plaintiff's attempted circumvention of a binding issue, as opposed to a binding claim. Even under the widely accepted res judicata-based artful pleading doctrine, to which Respondent raises no objection, an action may be removed only after the prior federal claim reaches a final judgment. That is, removal of the state action would depend on both the timing and the outcome of the federal action.

Second, Respondent expresses the related concern that a plaintiff in a state case "would create or not create federal question jurisdiction" depending on whether he sought to file the same motion rejected in the prior federal court action. Resp. Br. at 12. This dilemma is a fiction. Nowhere do Petitioners suggest that jurisdiction should attach midway through a state action depending on motions filed by the plaintiffs and their relation to issues decided in a federal court proceeding. Jurisdiction for removal purposes, as with original jurisdiction, is determined on the basis of the content of the complaint (and any amendments to the complaint). 28 U.S.C. § 1441. In this case, it is clear from the face of the complaint that the plaintiffs seek class treatment (indeed, they sought and obtained *ex parte* conditional certification before they even served the complaint on defendants). That is, they are seeking to relitigate an issue that had previously been decided against them by a federal court in a virtually identical case.

Finally, Respondent imagines that recognition of collateral estoppel-based artful pleading will open the floodgates for removal of state cases that raise issues, however small, that were preclusively decided by a prior federal court ruling.

Resp. Br. at 13. Yet the example the Respondent provides highlights that this concern too is without foundation. Respondent questions whether an issue related to a "mundane discovery matter" could form the basis for removal based on collateral estoppel-based artful pleading. But any conflict with a prior discovery order would arise out of a discovery *motion* filed by the plaintiffs in the state case, and *not* from the face of the complaint.

Furthermore, to the extent that a complaint does itself evidence an attempt by the plaintiffs to relitigate issues that have been necessarily and finally decided against them in a federal court, we have no doubt that in applying this variation of the artful pleading doctrine, courts would be able to distinguish between minor issues and ones that, as here, lie at the heart of a plaintiff's complaint. After all, the purpose of the artful pleading doctrine, whether based on claim preclusion or issue preclusion, is to deny plaintiffs the opportunity to avoid a binding prior federal court ruling by refiling a case in state court. If the issue previously decided against the plaintiff were minor, the plaintiff would not likely refile in state court in an effort to avoid it.

3. The Remand Statute Should Be Interpreted In Light Of The Policy Goals Of Fairness And Judicial Economy

In response to Petitioners' argument that removal based on collateral estoppel and the artful pleading doctrine promotes fairness and judicial economy, Respondent claims that those policy justifications are outside the scope of the removal statute. Resp. Br. at 14-16. Yet those same justifications support the res judicata-based artful pleading doctrine, which has been the basis for removal of cases dating back to 1950, *see Deauville Assoc., Inc. v. Lojoy Corp.*, 181 F.2d 5, 6 (5th Cir.), *cert. denied*, 340 U.S. 905 (1950), and has now been recognized by the Second, Fifth, Seventh, Ninth and Eleventh Cir-

cuits.[3] Congress has amended the removal statute five times since the 1970s without once curtailing the practice or even expressing any concern that the artful pleading doctrine was not properly grounded in the removal statute.

B. PETITIONERS' POSITION IS CONSISTENT WITH *ARC AMERICA*

Respondent raises *California v. ARC America Corp.*, 490 U.S. 93 (1989) as a shield against Petitioners' alternate artful pleading argument, claiming that Petitioners seek to prevent the application of state antitrust laws to any conduct involving interstate activity. Resp. Br. at 18-19. Again Respondent misses the mark. *ARC America* held only that state antitrust laws are not preempted by federal antitrust laws. Petitioners have never argued to the contrary.

Respondent's allegation rests on a misstatement of the Petitioners' argument. Quoting the Seventh Circuit, which had also fundamentally misunderstood the argument, the Respondent characterized the Petitioners as arguing that:

> *any* time an antitrust plaintiff brings a suit in state court under a state antitrust statute that contains substantive provisions similar to that of a federal antitrust statute, the defendant can remove on the ground that the plaintiff is trying to bring a federal antitrust suit yet to insulate it from removal to a federal court.

Resp. Br. at 6-7 (emphasis in original).

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[3] *See Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754 (2d Cir.), *cert. denied*, 479 U.S. 885 (1986); *Rivet*, 108 F.3d 576; *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911-12 (7th Cir. 1993); *Sullivan v. First Affiliated Secur., Inc.*, 813 F.2d 1368 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987). By incorporating Fifth Circuit precedent, including *Deauville Associates* and *Villareal v. Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976), the Eleventh Circuit also recognizes the res judicata-based artful pleading doctrine. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

Petitioners have never made such an argument. Rather, Petitioners' argument is confined to instances where the states themselves—through laws enacted by their legislatures and interpreted by their courts—decided to limit the applicability of their antitrust laws to activity that was fundamentally intrastate in nature. Under these circumstances, an allegation of a nationwide price-fixing conspiracy in an industry that transacts business daily in every state would be outside the reach of the laws of those states. Thus, contrary to the Respondent's charge, the Petitioners make a much more limited argument: removal jurisdiction should attach where a plaintiff's state court complaint alleges facts that mimic those in multiple pending federal cases but where such facts make out no cognizable claim under state law. As correctly stated, Petitioners' alternative artful-pleading argument in no way contravenes this Court's holding in *ARC America*.

As discussed in the Petitioners' Opening Brief (Br. at 19-23), it is precisely when a state court complaint, as here, lacks any cognizable state law claim and mimics the factual allegations in a federal court action that courts have held that the claims alleged have a sufficient federal character to support removal on federal question jurisdiction grounds.[4] *See Moitie*, 452 U.S. at 397 n.2 (citing two such cases with approval).

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[4] Respondent's assertion that the damages aspect of his federal claim is barred by this Court's holding in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), is irrelevant. The Respondent's status as an indirect purchaser does not divest a federal court of jurisdiction over the matter. *See Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560-61 (1968) (state law complaint involving preempted field of labor law was properly removed even though federal law offered no relief). It merely provides Petitioners with an affirmative defense to the merits of his claim. Indeed, in one of the cases cited by the Court in *Moitie* as sufficiently federal to warrant removal, the indirect purchaser plaintiffs were similarly barred from recovering under federal antitrust law by *Illinois Brick*. *Moitie*, 452 U.S. at 398, n.2 (citing *In re Wiring Devices Antitrust Litig.*, 498 F. Supp. 79, 85-87 (E.D.N.Y. 1980)).

CONCLUSION

For the foregoing reasons and for the reasons stated more fully in the Petitioners' Opening Brief, the petition for a writ of certiorari should be granted.

January 8, 1998

Respectfully submitted,

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